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UNCLAS SECTION 01 OF 05 TASHKENT 000312

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DEPT FOR INL ANDREW BUHLER AND NORIS BALABANIAN; SCA/CEN
FOR BRIAN RORAFF AND RICK SNELSIRE; EUR/ACE FOR RICK
STODDARD AND DEAN FISCHER
DEPT OF JUSTICE FOR OPDAT CATHERINE NEWCOMBE AND JUDGE JOHN
TUNHEIM
ASTANA FOR ALMATY/USAID

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TAGS: PHUM EAID PREL KCRM PGOV PINR ASEC UZ
SUBJECT: NOT QUITE HABEAS CORPUS, BUT A GOOD STEP

REF: TASHKENT 303

SENSITIVE BUT UNCLASSIFIED -- PLEASE PROTECT ACCORDINGLY

¶1. (SBU) Summary: On March 6 a visiting U.S. Federal Judge met on the margins of a USAID-funded conference on human rights and law enforcement in Tashkent with Deputy Minister of Internal Affairs (MVD) Alisher Sharafutdinov and Tashkent State Law Institute Professor Umida Tukhtasheva. The private, spontaneous meeting was an opportunity to review areas of concern in significant detail and stemmed from a productive plenary discussion in which the judge shared his views as well as analysis from the U.S. Department of Justice Office of Prosecutorial Development and Assistance Training (DOJ/OPDAT). Specific areas of concern under the International Covenant on Civil and Political Rights (ICCPR), which Uzbekistan has ratified, include: defining when the clock starts ticking in tracking initial detention after arrest; the lack of clear probable cause standards in weighing pre-trial detention; the closed nature of court hearings to decide on detentions; the right to access counsel in practice; and the right to remain silent. The Rapid Reaction Group, an unregistered NGO in Uzbekistan, conducted an early study after the first month which claimed that nothing has changed yet, which contradicts the Ministry of Internal Affairs' initial data. Sharafutdinov humbly admitted that "the law has many loopholes" but asserted that it was a major step forward. The conference provided a valuable forum in which to intensify the dialogue, and the Uzbeks appreciated the in-depth discussion with the U.S. Judge. This may be the best opportunity to pursue meaningful legal reform since the American Bar Association Central and East European Law Initiative (ABA/CEELI) was asked to leave the country in 2006. End summary.

Background

¶2. (SBU) A new law went into effect in Uzbekistan on January 1 entitled "On Amendments and Addenda to some Legislative Acts of the Republic of Uzbekistan in Relation with Transfer to Courts the Right to Issue Sanctions for Arrest." The law addresses many habeas corpus issues and, while it is a major step forward in providing a legal basis for defendants' rights, it contains many shortcomings. Uzbekistan ratified the ICCPR in 1995, thereby accepting obligations to fulfill its requirements, and a visiting U.S. Federal Judge presented an insightful analysis of the law during a plenary session of a high-profile, USAID-funded human rights and law enforcement conference in Tashkent on March 5-6 (reftel). Sharafutdinov and Tukhtasheva met privately with the U.S. Judge on the margins of the conference for two hours on March 6 to discuss the nuances of the law in detail, focusing on areas where the legislation does not meet international standards.

When Does the Clock Start Ticking?

¶3. (SBU) The U.S. Judge presented concerns that a phrase in the Uzbek law that starts the habeas clock ticking "from time of arrest" can be interpreted differently based on when the detention is officially logged. Whereas international law is clear that arrest should be defined as the moment of detention, under the Uzbek law it starts from the time the applicant is brought to the police station. The U.S. Judge noted that this gray area creates an opportunity for police officials to delay a suspect's transfer to a police station after the initial arrest. Sharafutdinov agreed that this is a potential problem but wondered how it could be enforced, adding that "it's hard to control how much time it takes

officers to get to the station given our resources." However, while the Uzbek law allows 24 hours to process detainees at a police station, Sharafutdinov said the average is only 1.5 hours and they are revising procedures to make this even faster. Sharafutdinov said the Government of Uzbekistan would require extensive communications equipment for each officer and police station around the country as well as a central monitoring system to record detentions and transfers in real-time. (Comment: This could be a complementary aspect of possible future habeas corpus assistance programs, provided progress is first sufficient to justify such a commitment of resources. End comment.)

¶4. (SBU) The U.S. Judge noted that while a 48-hour detention is the maximum allowed for most Western countries under international law, he believes Uzbekistan can justify its 72-hour period given its existing structure (which Kosovo has recently established as well). However, the Uzbek law also allows for an additional 48-hour extension of initial detention as well as an additional 10 days in exigent circumstances. According to the U.S. Judge, these extra periods will cause problems for Uzbekistan under international scrutiny of its law. Sharafutdinov was forthright that so far in 2008 there have indeed been six 48-hour extensions approved but no cases in which a 10-day extension was requested. He cited a need for additional time to conduct investigations and detailed questions by judges as reasons for the six 48-hour extensions that were granted. Under the new law only the courts can request an additional 48 hours, not investigators, which is a significant improvement. Sharafutdinov also lamented that Uzbekistan cannot afford the "pre-trial services" packages of background data that U.S. courts have access to in order to quickly assess the risk level of an arrested suspect, and therefore more time is required for investigations after the initial arrest. Uzbek law also does not allow investigators to begin investigating a suspect prior to an arrest, which the U.S. Judge flagged as a problem.

Probable Cause for Detention

¶5. (SBU) The U.S. Judge expressed concern about probable cause under the Uzbek statute and stressed that clear standards are necessary to assist judges in making important decisions about whether to order pre-trial detention of suspects. He underscored the need to weigh probable cause before issuing arrest warrants, which requires an examination of the level of evidence to determine whether there are reasonable grounds to proceed. In contrast, the standard for determining guilt in a subsequent trial should be much higher. Uzbekistan needs to make modifications in order to ensure that these are distinct decisions, and clear standards would help judges assess the prosecutors' information.

¶6. (SBU) Another important point discussed was that there should be no blanket law on detentions; rather, there should be a case-by-case determination based on a presumption of freedom. The Uzbek judges need to consider whether a suspect is likely to commit another crime and how serious the crime is, and the U.S. Judge explained that there may be overwhelming evidence of guilt but the person may clearly not be a risk in society while awaiting trial. The U.S. Judge said that it is acceptable to make a decision to detain a suspect until trial, but that decision should be the result of a process.

Public or Closed Hearings?

¶7. (SBU) The prevalence of closed hearings on important habeas decisions are also a point of concern under the new Uzbek law. The U.S. Judge agreed that the decision to issue a warrant before an arrest is made can be closed because otherwise the suspect would be alerted to the impending arrest; however, after the arrest this concern is no longer a factor and subsequent hearings should be open. The current Uzbek statute does not comply with ICCPR standards in this regard, which specify that all hearings should be open. The U.S. Judge clarified that there are exceptions (such as for juveniles or cases when there could be embarrassment to a victim) but these are narrow.

Right versus Access to Counsel

¶8. (SBU) There is now a clear standard under Uzbek law regarding the right to defense counsel and it is an improvement, according to the U.S. Judge. However, the language makes it possible for prosecutors to convince defendants they do not need defense, which would undermine the role of defense lawyers since the rights apply "if" counsel is participating in the process. The U.S. Judge urged his Uzbek interlocutors not to allow a loophole to keep defense lawyers out of the system since they play an essential role. He cited the recent Massaoui trial in the U.S., where the defendant had a team of lawyers representing his interests despite being totally uncooperative and averse to having any defense counsel. The U.S. Judge asserted that the right to habeas corpus is not enforceable without independent courts and defense attorneys.

¶9. (SBU) Sharafutdinov acknowledged these points, and noted that Uzbekistan has implemented new mandatory lists of appointed defense attorneys to eliminate "pocket lawyers," who were mere cronies of investigators and did nothing to serve their clients. This ineffective and corrupt defense system apparently caused an embarrassing scandal for the Government of Uzbekistan in 2002, but Sharafutdinov did not elaborate. He said the Ministry of Internal Affairs is still struggling to change the attitudes of prosecutors, who often feel that defense attorneys simply obstruct the process. Nonetheless, he added that there is increasing recognition that having defense lawyers present can help protect the interests of prosecutors as well as defendants. He cited an example of a detainee who allegedly jumped to his death from

a window during an interrogation; the investigators' version of events was corroborated because the defense counsel was present at the time.

Right to Remain Silent

¶10. (SBU) The Ministry of Internal Affairs has begun distributing leaflets to all detainees informing them of their rights, which the U.S. Judge commended publicly at the conference and again on the margins as an important step. However, while suspects have a right to testify, Uzbek law indicates that suspects cannot refrain from participating in pre-trial investigation. Thus, it is unclear whether there is a real right to remain silent. Sharafutdinov conceded that this is something that could be amended to make much clearer. However, he said suspects are warned about testimony being used as evidence against them in the trial.

How Does the U.S. Use Sensitive Evidence?

¶11. (SBU) Sharafutdinov noted that there were several challenging cases against suspected terrorists in Uzbekistan

in which authorities were unsure how to proceed with sensitive evidence. He asked how the U.S. maintains a balance between protecting defendants' rights and prosecuting with the full weight of available evidence, even if it is classified. The U.S. Judge noted that courts can order lawyers to remain silent, which he said has worked well. Also, even if there is classified evidence, there should not be a secret trial. The best solution is to create an unclassified reproduction of the evidence -- omitting the

sensitive data -- which the defendant and the defense counsel can inspect. This approach interested the Uzbek officials, and it seemed they had not previously thought about incorporating defense attorneys into such cases.

Early Empirical Data

¶12. (SBU) The Rapid Reaction Group, an unregistered human rights organization in Uzbekistan, conducted an independent analysis of what has actually changed after the first 30 days of the law. The methodology involved anonymous surveys of nine officials from the Office of the General Prosecutor, six judges of district courts, and four police investigators in addition to studying materials of 12 criminal cases in five regions of the country. The Rapid Reaction Group study concluded that the situation "has not changed in any way," and that the courts have demonstrated a technical inability to perform their new roles and the influence of the prosecutors remains as strong as before. The study also noted that there has been an increase in paperwork and bureaucracy to achieve the appearance of habeas corpus procedures, but with no real effect. The group's field observations also concluded that "inspectors and investigators often appear for providing testimonies during interrogation," whereas defense counsel was rarely present. The Tashkent City Bar Association agreed that there are some flaws but noted that the law "will be tested by time and practice." Initial data from the MinistQf Internal Affairs claims that there are already fewer requests for arrest warrants and some requests are beingQrnedQwn by the courts (reftel).

Next Steps

¶13. (SBU) At the end of the two-hour meeting Sharafutdinov acknowledged that "the new law has a lot of loopholes." He also volunteered that "it is premature to call this habeas

corpus, but it has many elements." (Note: This is consistent with the analysis of experts at the U.S. Department of Justice OPDAT who reviewed the law prior to the Tashkent conference and suggests we are on the same page. End note.) Sharafutdinov explained that "there were many fights" in the drafting of the legislation, which took place over a lengthy time and pitted reformers against those who wanted the status quo. He suggested that the law which emerged was the best they could have hoped for at the time, and he said "first we'll get used to these new conditions" and then consider the next steps.

¶14. (SBU) Tukhtasheva was quick to downplay the need for international training assistance, pointing out that the Government of Uzbekistan had conducted extensive training between the time the new law was passed and the time it went into effect. However, Sharafutdinov quickly disagreed (perhaps sensing implications for future cooperation), noting that it was difficult to train when the law was not actually in effect and that international perspectives are useful. (Comment: Sharafutdinov prefers waiting for at least a year to see how the law is implemented before working with

international partners like the U.S. on modifying it, but he would likely be receptive to a gradual approach involving roundtables with other key stakeholders such as the Ministry of Justice, focused training with defense attorneys and judges, and sessions on why further amendments are necessary. End comment.)

Comment

¶15. (SBU) Embassy officers have had several high-profile and productive meetings with Sharafutdinov in recent weeks, and his willingness to sit down privately with a visiting U.S. Judge for two hours to critically examine a law he is proud of demonstrates his genuine interest in implementing reforms. His humble statements about systemic flaws and past mistakes before the cameras during the plenary sessions were apparently not just for public consumption (reftel). We believe the time is right to build on the positive momentum generated by this conference, as this may be the most significant opportunity to engage the Government of Uzbekistan on meaningful legal reform since ABA/CEELI was asked to leave in 2006. This useful meeting on the margins of the USAID-funded conference further demonstrates the utility of these forums in helping us intensify our dialogue with key interlocutors.

NORLAND